

OPINION

In September of 1997, the Shelby County Grand Jury indicted Defendant Eric Amos for carjacking. In March of 1998, the Shelby County Grand Jury indicted Defendant for theft of property worth between \$10,000.00 and \$60,000.00. On May 4, 1998, the State moved for consolidation of the indictments and the trial court granted the motion. Following a jury trial on May 12–14, 1998, Defendant was convicted of carjacking and theft of property worth between \$10,000.00 and \$60,000.00. After a sentencing hearing on June 11, 1998, the trial court sentenced Defendant as a Range II multiple offender to concurrent terms of twenty years for carjacking and ten years for theft. Defendant challenges his convictions, raising the following issues:

- 1) whether the evidence was sufficient to support his conviction for carjacking; and
- 2) whether his conviction for theft is barred by principles of double jeopardy.

After a review of the record, we affirm the judgment of the trial court in part and reverse it in part.

I. FACTS

Michael Vogler testified that his son Chris spent the day with him on April 3, 1997, because Chris had sustained a concussion in a car accident on that day. At approximately 8:00 p.m., Chris left the Vogler residence and began walking down the street. Michael Vogler then decided to find Chris and bring him back to the residence.

Michael Vogler testified that he then got into his Suburban vehicle and began looking for his son. When he found Chris, he asked him to get into the Suburban, but Chris refused. At this point, Michael Vogler put his vehicle in park, and left the

door open and left the vehicle running and got out of the vehicle. Michael Vogler then walked around the vehicle and told Chris to come with him.

Michael Vogler testified that when he started to walk around the front of the vehicle and Chris reached for the door handle, Defendant jumped in the Suburban and shifted into drive. Michael Vogler then opened the door and reached into the vehicle before it started to move in order to grab Defendant. Michael Vogler then ran along side the vehicle as it started to pull away. Michael Vogler also noticed that Chris had been able to get his upper body into the vehicle and he was trying to grab the steering wheel. Shortly thereafter, Michael and Chris Vogler let go of the vehicle and ran back to the Vogler residence where they called the police.

Chris Vogler testified that he jumped in the window right before Defendant started driving the Suburban away. Defendant told Chris Vogler to get out. Chris Vogler subsequently asked Defendant to slow down and when Defendant complied, Chris Vogler jumped out of the vehicle.

Officer J.B. Bell of the Memphis, Tennessee Police Department testified that at approximately 1:00 p.m. on April 6, 1997, he saw a Suburban that he had been told to be on the lookout for. Bell observed that Defendant was the driver and there were three or four passengers in the Suburban. When Bell stopped the vehicle, all of the occupants fled the scene.

Sergeant Michael Clark of the Memphis Police Department testified that he interviewed Defendant on May 6, 1997. After Defendant was advised of his rights and signed a waiver of rights form, he agreed to make a statement. Defendant subsequently admitted that he was the sole participant in the carjacking of the Suburban. Defendant stated that when he saw the driver of the vehicle arguing with his son, he jumped in and drove away. Defendant denied that the driver and his son tried to stop him from taking the vehicle. Defendant also stated that he had a .38

revolver in his possession during the carjacking, but he did not have to use it. In addition, Defendant admitted that he was driving the Suburban when it was stopped by the police.

II. SUFFICIENCY OF THE EVIDENCE

Defendant contends that the evidence was insufficient to support his conviction for carjacking. We disagree.

When an appellant challenges the sufficiency of the evidence, this Court is obliged to review that challenge according to certain well-settled principles. A verdict of guilty by the jury, approved by the trial judge, accredits the testimony of the State's witnesses and resolves all conflicts in the testimony in favor of the State. State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994). Although an accused is originally cloaked with a presumption of innocence, a jury verdict removes this presumption and replaces it with one of guilt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with Appellant to demonstrate the insufficiency of the convicting evidence. Id. On appeal, "the [S]tate is entitled to the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." Id. Where the sufficiency of the evidence is contested on appeal, the relevant question for the reviewing court is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). In conducting our evaluation of the convicting evidence, this Court is precluded from reweighing or reconsidering the evidence. State v. Morgan, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996). Moreover, this Court may not substitute its own inferences "for those drawn by the trier of fact from circumstantial evidence." State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Finally, Rule 13(e) of the Tennessee Rules of Appellate Procedure provides, "findings of guilt in criminal actions whether by the trial court or

jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact beyond a reasonable doubt.”

Tennessee Code Annotated section 39-13-404 provides:

“Carjacking” is the intentional or knowing taking of a motor vehicle from the possession of another by use of:

- (1) A deadly weapon; or
- (2) Force or Intimidation.

Tenn Code Ann. § 39-13-404(a) (1997). Defendant concedes that the evidence was sufficient to show that he intentionally took a motor vehicle from the possession of another. However, Defendant contends that there was no proof that he used a deadly weapon or used force or intimidation to take the vehicle. Specifically, Defendant argues that he had already stolen the vehicle before the Voglers attempted to stop him and thus, any force or intimidation that occurred took place after the offense had already been completed.

We conclude that when the evidence is viewed in the light most favorable to the State, as it must be, the evidence was sufficient for a rational jury to conclude beyond a reasonable doubt that Defendant had committed the offense of carjacking.

Michael Vogler testified that

I had run back toward the driver’s side and before the car started to move, I opened the door and reached my hand in and tried to get a hold of the individual that was driving the car. And I started running down the street as the car started to pull away.

In addition, Chris Vogler testified that

My dad . . . was yelling at me through the window. He got out. Walked around the front and a guy jumped in. And I jumped in the window. And he took off down the street.

A rational jury could certainly conclude from this testimony that both of the Voglers were at least partially inside of the vehicle while Defendant was committing the offense rather than after the offense had already been completed. Moreover, a rational jury could conclude that Defendant’s action of accelerating down the road while both of the Voglers were partially inside of the vehicle, causing them to let go and get out of the vehicle, constituted the use of force to take the vehicle.

Tennessee Code Annotated section 39-11-106 provides that “[f]orce’ means compulsion by use of physical power or violence and shall be broadly construed to accomplish the purposes of [the Criminal Code].” Tenn. Code Ann. § 39-11-106(a)(12) (1997). We conclude that Defendant’s actions constituted the use of force under this definition.

In short, we hold that the evidence was sufficient to support Defendant’s conviction for carjacking. Defendant is not entitled to relief on this issue.

III. DOUBLE JEOPARDY

Defendant contends that his conviction for theft violates principles of double jeopardy. We agree.

Initially, we note that Defendant did not raise this issue in the trial court. The general rule is that appellate courts will not consider issues that are not raised in the trial court; however, plain error is an appropriate consideration for an appellate court whether properly assigned or not. State v. Hoyt, 928 S.W.2d 935, 946 (Tenn. Crim. App. 1995). An error affecting “the substantial rights of an accused may be noticed at any time . . . where necessary to do substantial justice.” Tenn. R. Crim. P. 52(b). This is the case here.

The United States and Tennessee Constitutions protect the accused from being twice placed in jeopardy for the same offense. U.S. Const. amend. V; Tenn. Const. Art. I, § 10. In State v. Denton, 938 S.W.2d 373 (Tenn. 1996), the Tennessee Supreme Court fashioned a method by which courts should analyze a double jeopardy claim under the Tennessee Constitution:

(1) a Blockburger analysis of the statutory offenses; (2) an analysis, guided by the principles of Duchac[v. State, 505 S.W.2d 237 (Tenn. 1973)], of the evidence used to prove the offenses; (3) a consideration of whether there

were multiple victims or discrete acts; and (4) a comparison of the purposes of the respective statutes. None of these steps is determinative; rather the results of each must be weighed and considered in relation to each other.

938 S.W.2d at 381.

First, we must start with an analysis of the statutory offenses as provided in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 2d 306 (1932). The Blockburger test states that “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.” 284 U.S. at 304, 52 S.Ct. at 182. A Blockburger violation is a violation of the double jeopardy provisions of the constitutions of both the United States and Tennessee.

We agree with the State that the two offenses do have some elements that are different. While the offense of carjacking requires proof that the defendant took a motor vehicle from the possession of another by use of a deadly weapon or by use of force or intimidation, Tenn Code Ann. § 39-13-404(a) (1997), the offense of theft can be established by proof of the taking of any object and it does not require proof that the object was in the possession of another or that it was taken by use of a deadly weapon or by use of force or intimidation, Tenn. Code Ann. § 39-14-103 (1997).

Second, we must conduct an analysis of the evidence used to prove each offense. The evidence used to prove each offense is substantially the same. Although the carjacking offense related to Defendant’s initial taking of the vehicle on April 3 and the theft offense related to Defendant’s subsequent driving of the vehicle on April 6, the evidence used to establish the commission of both offenses was that Defendant exercised control over Michael Vogler’s vehicle without consent to do so.

Third, we must conduct an analysis of whether there were multiple victims or discrete acts. While it is true that Chris Vogler could be considered a victim of the carjacking offense, it is evident that Michael Vogler was the primary victim of this offense and it appears from the record that Michael Vogler was the only victim of the theft offense. In addition, the two offenses were based on what was essentially one act—Defendant’s taking possession of the vehicle. Although the theft conviction was based on the fact that Defendant was still driving the vehicle three days after the carjacking, this act of driving was essentially just a continuation of Defendant’s original action of taking possession of the vehicle away from Michael Vogler.

Fourth, we must conduct an analysis of the purposes of the relevant statutes. We agree with the State that the primary purpose of the carjacking statute is to protect persons from violence that could occur during the taking of a vehicle by force or use of a deadly weapon while the purpose of the theft statute is to protect the property rights of individuals. However, one of the purposes of the carjacking statute is also to protect the property rights of individuals. Thus, while the purposes of the two statutes are not identical, they are somewhat similar in nature.

While some of the factors under the Denton analysis favor the State, none of the factors is determinative and the results of each must be weighed and considered in relation to each other. Denton, 938 S.W.2d at 381. We conclude that as a whole, the Denton factors indicate that Defendant’s convictions for both carjacking and theft violate principles of double jeopardy. Under the State’s position, Defendant could have been subjected to at least two more theft convictions for his continued use of the vehicle if there was proof that he had also driven the Suburban on April 4 and April 5, 1997. If the State’s position is adopted, a defendant could potentially receive hundreds of theft convictions if the proof showed that he or she had driven a vehicle every day of the year following a carjacking. Clearly, such a situation would violate principles of double jeopardy.

Finally, we note that this Court recently addressed a similar issue in State v. Darrell R. Kennedy, No. 02C01-9708-CR-00318, 1999 WL 74557 (Tenn. Crim. App., Jackson, Feb. 17, 1999), perm. to appeal denied, (Tenn. 1999). In Kennedy, this Court held that the defendant could not be convicted of both theft by unlawfully obtaining possession of property and theft by exercising control over property when the proof simply showed that the defendant stole some jewelry and still had the same jewelry in his possession approximately three months later. 1999 WL 74557, at *10. This Court noted that theft by obtaining and theft by exercising control over are the same offense for purposes of double jeopardy. Id., 1999 WL 74557, at *10. Similarly, the carjacking by obtaining possession of the vehicle and the theft by exercising control over the vehicle are the same offense for double jeopardy purposes. Indeed, the trial court specifically instructed the jury that the offense of carjacking embraces and includes the lesser offense of theft of property. As Defendant can only be convicted of one offense, his conviction for carjacking is affirmed and his conviction for theft is vacated and dismissed.

IV. CONCLUSION

For the reasons stated above, we affirm Defendant's conviction for carjacking and we reverse and dismiss his conviction for theft.

THOMAS T. WOODALL, Judge

CONCUR:

DAVID G. HAYES, Judge

JOE G. RILEY, JR., Judge